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INTERNATIONAL COOPERATION AND PRACTICAL TECHNICAL ASSISTANCE FOR STRENGTHENING THE RULE OF LAW: PROMOTING THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAMME

Background paper for the workshop on extradition and international cooperation: exchange of national experiences and implementation of extradition principles in national legislation

Summary

The Economic and Social Council, in its resolution 1993/32, endorsed the programme of work for the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders proposed by the Commission on Crime Prevention and Criminal Justice at its second session, which included the holding of a one-day workshop on "Extradition and international cooperation: exchange of national experiences and implementation of extradition principles in national legislation". It was recommended that the workshop cover specific problems in the implementation of extradition treaties and related forms of international cooperation, and methods of overcoming those problems, with due regard for democratic structures and that it should also consider how, in practical terms, extradition and other international cooperation mechanisms should function, general impediments to extradition, and how to balance extradition obligations against reasonable grounds for denial. The present report provides background information for discussion at the workshop, including an outline of the legislative and substantive background, various mechanisms for extradition, including bilateral and multilateral agreements, impediments to extradition, and relevant policy issues. To carry forward the momentum towards improving extradition relations developed in the workshop, particular training needs will be considered, together with existing training methods and resources. As a result, it is hoped that further exchanges will be generated and specific training programmes developed, as well as other proposals and contributions concerning technical cooperation.

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CONTENTS

		Paragraphs	*Page*
INTRODUCTION		1-14	3
	A. Legislative background	1-2	3
	B. Substantive background	3-8	3
	C. The purpose and evolution of extradition	9-14	5
I.	THE AVAILABILITY OF EXTRADITION MECHANISMS	15-40	6
	A. Alternatives to international extradition agreements	15-17	6
	B. Negotiation of multilateral and bilateral instruments	18-39	7
	C. Succession to existing instruments	40	11
II.	PROBLEMS IN THE PREPARATION OF EXTRADITION REQUESTS	41-61	11
	A. Dual criminality and the "list" approach	41-51	11
	B. Political, tax and fiscal offences	52-61	13
III.	PROBLEMS IN THE EXECUTION OF REQUESTS	62-81	15
	A. Refusals based on nationality and alternatives	62-63	15
	B. Refusals based on the principle of *ne bis in idem*	64	16
	C. *In absentia* convictions and other humanitarian concerns	65-71	16
	D. Representation of the requesting State	72-73	18
	E. Provisional arrest and sufficiency of documentation	74-81	18
IV.	POLICY ISSUES CONCERNING IMPEDIMENTS TO EXTRADITION	82-92	20
	A. Policy development and bridging the gaps between legal systems	82-85	20
	B. Causes of delay and misunderstanding	86-91	20
	C. Technical cooperation activities and follow-up	92	21

INTRODUCTION

A. Legislative background

1. A workshop entitled "Extradition and international cooperation: exchange of national experiences and implementation of relevant principles in national legislation" was envisaged at the first session of the Commission on Crime Prevention and Criminal Justice. Subsequently the Economic and Social Council, in its resolution 1992/24, decided that research and demonstration workshops should be held as part of the programme for the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The following year, the Council, in its resolution 1993/32, endorsed the proposal by the Commission at its second session to hold six workshops for the Ninth Congress, including a one-day workshop on extradition and international cooperation.

2. At its third session, the Commission further considered preparations for the Ninth Congress, and made a number of recommendations, which were adopted by the Council in its resolution 1994/19. In particular, in section II of that resolution, the Council recommended that the workshop consider specific problems in the implementation of extradition treaties and related forms of international cooperation, and methods of overcoming those problems, with due regard to the necessity of observing democratic structures. It also recommended that the workshop should consider how, in practical terms, extradition and other international cooperation mechanisms should function; it should also consider general impediments to extradition and how to balance extradition obligations against reasonable grounds for denial. The Government of the United States of America and the International Association of Penal Law have generously contributed to the organization of the workshop, including its substantive preparations, for which particular acknowledgement is due.

B. Substantive background

3. Recent events that have contributed to the development of the workshop include the convening of the Ad Hoc Expert Group Meeting on Strategies to Deal with Transnational Crime at Smolenice, from 27 to 31 May 1991, where it was recommended, *inter alia*, that national and international efforts to deal with transnational crime should focus on cooperation through extradition and mutual assistance, and designation of appropriate national coordinating authorities to expedite treaty implementation (Economic and Social Council resolution 1992/23, annex I, subpara. 7 (c)). The Ad Hoc Expert Group on Implementing Legislation to Foster Reliance on Model Treaties, meeting at Vienna from 18 to 21 October 1993, recommended that Member States should consider clarifying the roles of various government departments and their foreign ministries and designating a central authority for international cooperation matters, periodically reviewing treaty relations and implementing legislation, and enacting streamlined national legislation to give effect to international treaties (see E/CN.15/1994/4/Add.1, annex).

4. A number of recommendations have also been made on the subject of extradition in the course of the regional preparatory meetings for the Ninth Congress. The recommendations of the Asia and Pacific Regional Preparatory Meeting and the Western Asia Regional Preparatory Meeting stressed the importance of bilateral and multilateral cooperation arrangements and the need for periodic dissemination of information on national legislation concerning international cooperation (A/CONF.169/RPM.1 and Rev.1 and Rev.1/Corr.1, para. 41, and A/CONF.169/RPM.5, para. 21). The African Regional Preparatory Meeting mentioned the assistance provided by the Crime Prevention and Criminal Justice Branch of the United Nations Secretariat to the Economic Community of West African States (ECOWAS) in connection with elaboration of a convention on extradition and other matters (A/CONF.169/RPM.2, para. 23), and stressed that the effectiveness of the United Nations model treaties should be reviewed and obstacles in their application analysed (ibid., para. 24).

The European Regional Meeting proposed that the workshop consider the practical implementation of extradition procedures, impediments to extradition, and how to achieve a balance between extradition regimes and the need for reasonable grounds for denial of extradition. It also suggested that consideration be given to various forms of technical assistance, such as internships, and the need to reexamine existing arrangements, including the United Nations model treaties, in the light of recent developments, including new types of crime (A/CONF.169/RPM.3 and Corr.1, paras. 23-25 and 77).

5. The World Ministerial Conference on Organized Transnational Crime, held at Naples from 21 to 23 November 1994, considered the most effective forms of international cooperation against organized transnational crime. As may be seen from the report of the Conference (A/49/748, annex), many participants were of the view that extradition and other cooperative measures to prevent and control the proceeds of crime provided effective modalities for success in that area and the role of the United Nations model treaties in that context. It was also noted (ibid., para. 47) that impediments to extradition, such as non-extradition of nationals, needed to be resolved (ibid., para. 48). In the Global Action Plan Against Organized Transnational Crime (see A/49/748, annex, section I), subsequently approved by the General Assembly in its resolution 49/159, it was stated in paragraph 25 that States "should endeavour to implement fully existing bilateral and multilateral conventions and agreements concerning extradition, to ensure that all provisions [concerning political asylum] are respected and to ensure effective implementation of requests for mutual legal assistance". In paragraph 24, it was recommended that reliance on, and more widespread promotion of, the model treaties should be pursued. In its resolution 49/159, the General Assembly requested the Commission on Crime Prevention and Criminal Justice to keep the implementation of the Global Action Plan under regular review.

6. In order to assist with preparations for the workshop, the Secretariat circulated a questionnaire to all Member States. A total of 53 countries replied, 48 of them indicating that they would be interested in participating in the workshop. With respect to general themes, 41 States said they would be interested in discussing impediments to extradition, 39 mentioned training, and 35 policy development. With respect to specific issues, 42 States cited dual criminality, 36 mentioned burden-of-proof requirements, and political offences and humanitarian safeguards were both cited by 29 States; 27 States mentioned the specialty rule.

7. Thus, impediments to extradition were identified as being the item of greatest interest to extradition practitioners. This proved fortunate when it came to organizing the workshop, because nearly all of the other themes and issues that had been thought to merit discussion could be rephrased in terms of problems that impeded international cooperation, for example the lack of training in dealing with unfamiliar legal systems. Difficulties in negotiating bilateral and multilateral instruments, and the development of policies on such issues as the political offence exception and application of the principle of *ne bis in idem*, could all be treated within the framework of resolving extradition problems.

8. To be considered successful, the workshop should contribute to improved extradition relations and practice among Member States and to increased availability of training and technical assistance in the future. It is hoped that this paper, which is in the nature of a discussion guide, the workshop itself and any resulting activities, including the follow-up seminar to organize training resources and programmes, which may be hosted by the International Association of Penal Law at the International Institute of Higher Studies in Criminal Sciences, at Siracusa, will all contribute significantly to meeting the training goals.*

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*The format of this report is intended to parallel the format of the workshop itself, which will be divided into four sessions of no more than 90 minutes' duration, each session focusing on one of the topics set out herein. Within a particular session, the format of discussion is chosen by the Member State or States assuming responsibility for that topic; it may consist of a brief

C. The purpose and evolution of extradition

9. Extradition may be designated as the official surrender of a fugitive from justice, regardless of his consent, by the authorities of the State of residence to the authorities of another State for the purpose of criminal prosecution, or the execution of a sentence.[1] It is an important aspect of the range of measures for cooperation in criminal matters under international law.

10. Every extradition case may be regarded as an individual agreement under international law, notwithstanding the fact that the parties may also have established general extradition relations by concluding a bilateral or acceding to a multilateral extradition treaty. Under such an agreement, the State of residence (or requested State) exercising jurisdiction over the offender renounces its jurisdiction for the benefit of the other State (or requesting State). The motive for the return of the fugitive is the furtherance of foreign criminal proceedings. In some cases, however, expulsion and deportation have been used as alternatives to extradition, sometimes to accelerate the transfer of the fugitive, or to avoid any legal impediments to extradition.

11. The origins of international cooperation in the suppression of crime date back to the beginnings of formal diplomacy. In ancient times, rendition was considered a highly political act left to the unfettered discretion of the sovereign. Until the middle of the eighteenth century, extradition primarily involved political refugees rather than those accused of crimes. By the latter half of the eighteenth century, however, the movement of people between States had increased, and special problems began to arise with highway robbers, vagabonds and deserting troops. Over the following years, the principles of extradition were refined and developed to apply to the general problem of fugitives, until, by the end of the nineteenth century, a coherent body of legal rules governing extradition had developed, whose major principles still apply to contemporary extradition law.

12. General international law does not impose a duty on States to extradite, or to prosecute or punish fugitive offenders when extradition fails[2] (although the opposite view has been held by others and set forth as the axiom *dedere aut judicare* - extradite or prosecute). The duty to extradite or prosecute depends on a treaty fixing the prerequisites for, and exceptions to, such an obligation.

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introductory exposition followed by open discussion, of distribution of a written problem for discussion by participants, of a panel discussion, or simply of a general group discussion guided by a moderator. The Member States responsible for leading the discussion on a particular topic are requested to emphasize interactive discussion of the general issues being examined, rather than focusing on conditions or practices in a particular country. This is not intended to preclude a country that is serving as a discussion leader from citing novel or instructive problems it has encountered or from providing examples of solutions but simply to emphasize the fact that the focus should at all times be on communicating themes, approaches and solutions of general utility that are of interest beyond the borders of a single society.

References are made throughout to the United Nations Model Treaty on Extradition (General Assembly resolution 45/116, annex). A manual on the Model Treaty, entitled *A Guide for Implementation*, has been prepared by the Secretariat with the assistance of the Government of Australia and a number of national experts (forthcoming). The manual provides commentaries on each of the articles of the Model Treaty, explaining the purpose, application and implementation measures for the relevant article. A similar manual has been prepared on the implementation of the Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 45/117, annex).

13. Likewise, general international law contains no limitations on a State's freedom to extradite, except for fundamental human rights, which can be considered as part of *jus cogens*.* Whether, beyond that restriction, extradition is admissible in the absence of a treaty is decided solely under domestic law.

14. Every extradition case is subject to the rules of the applicable treaty or statute or to the exercise of sovereign power by the parties. In the absence of a universal convention or customary international law in this field, there can be as many "extradition laws" as there are treaties, national statutes, laws and practices. While international extradition law lacks a comprehensive and globally recognized set of precepts, a number of rules tend to recur in most treaties, statutes and practices. These include the means by which extraditable offences may be identified, the dual criminality rule, evidence of guilt, reciprocity[3] and the specialty rule,** as well as circumstances precluding extradition. The importance and implications of many of these rules and impediments to extradition are discussed below.

I. THE AVAILABILITY OF EXTRADITION MECHANISMS

A. Alternatives to international extradition agreements

15. The most obvious and basic impediment to successful international cooperation in the field of extradition is the lack of domestic legislation or of applicable international instruments furnishing a legal basis for non-consensual delivery of a fugitive to a requesting country. It can be argued that, historically, extradition, or its practical equivalent of expulsion to the requesting country, is essentially an exercise of sovereign discretion which is not inherently dependent upon the existence of an international agreement. Other alternatives to formal extradition procedures are often unilateral exercises of national discretion, such as deportation, expulsion, case-specific ad hoc arrangements, and voluntary departure or waiver of extradition. The increased recognition of the importance of the rule of law has, however, contributed to the belief that compulsory extradition should be founded upon regularly enacted domestic legislation of general applicability.

16. Such legislation can provide a legal basis for extradition, conditioned upon a commitment by the requesting country to grant extradition reciprocally, or it may function independently of such conditions. In the absence of any formal international agreement with the requesting country, it seems at first sight to be a very efficient way to avoid the expenditure of resources in extensive negotiation of international instruments and permit maximum protection of national sovereignty, as the extradition procedure is essentially within the discretion of the requested Government, which is not bound by any international extradition commitments. This approach, however, has an intrinsic limit in implementation because it depends exclusively upon the good will of the requested country.

17. Some countries have domestic law provisions that prohibit extradition in the absence of a treaty or other formal international agreement. This factor, the desire of many countries to establish predictability in extradition relationships and growing concern for the interests of the person who is the object of extradition all combine to make extradition increasingly a creature of international instruments.

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*See section IV, subsection C, below.

**The specialty rule is central to protecting the requested State from abuse of its extradition process. Some experts believe it should also protect the fugitive from unexpected criminal charges following extradition, although frequently used treaties permit the contracting States to waive specialty. (See the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Italy, executed at Rome, 13 October 1993.)

B. Negotiation of multilateral and bilateral instruments

18. Even considering the great number of treaties and conventions in force, the coverage of those international instruments is far from complete, particularly given the existence of new States and the changes in global travel and immigration patterns, which create a need for new extradition relationships. At its third session, the Commission on Crime Prevention and Criminal Justice adopted resolution 3/4 on the succession of States in respect of international treaties on combating various manifestations of crime[4] in which it urged successor States to confirm that they continued to be bound by obligations under relevant treaties to which their predecessor States were parties and encouraged them to become parties to international treaties to which their predecessor States were not parties. (See also section I, subsection C, below.)

19. Recently, immigration has increasingly come to be seen as a security and law enforcement problem and not merely a political, economic and social issue. In European countries, with closer economic and social integration under the European Union, the abolition of internal migration controls and increased cross-border movement have greatly increased the mobility of people, including offenders. Other countries have also been affected, and the suppression of illegal immigration has become prominent both in official pronouncements and in the conduct of law enforcement agencies. It should be noted that both the requesting and the requested States have an interest in bringing fugitives to justice and preventing reoffending.

20. To cure the problem by negotiating comprehensive modern instruments is desirable, but the realities of treaty negotiation are complex. Even bilateral treaties between States with comparable legal systems and cultures often take years to come to fruition because of the sensitivity of sovereignty interests, the necessity to reconcile the often differing interests of foreign ministries and ministries representing the criminal justice system, and the domestic political considerations that may weigh upon a Government's ability to secure legislative approval or implementation after the negotiation and signature process.

1. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988

21. The inescapable diversity, complexity and occasional *lacunae* that arise when each country maintains its own web of bilateral treaties have encouraged consideration of multilateral conventions. The most recent and perhaps most successful example of the utilization of the multilateral convention approach in the field of extradition is represented by article 6, paragraph 2, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,[5] which provides that "Each of the offences to which this article applies [drug and drug money laundering offences] shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them". Moreover, article 6, paragraph 4, of that Convention provides that "The Parties which do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves".

22. One hundred and five Member States have now become parties to the 1988 Convention, which unquestionably represents one of the greatest single advances in international criminal justice cooperation in recent decades, although, of course, it applies only to drug-related criminality, and future developments will probably encompass other facets of international concern.

23. A global convention holds out the promise of a single instrument embracing many States and thereby reducing the need for numerous specific instruments with single treaty partners. The negotiation process for the 1988 Convention extended over many years, however, and represented a very resource-intensive commitment for those involved. Universal conventions, by their very nature, must also accommodate more widely differing interests than bilateral treaties and therefore tend to become more generic and less stringent

in their application. Accordingly, they may be most appropriate when there is already a broad consensus on rather specific practical steps that need to be taken, so that the overall thrust and the practical consequences of these desired improvements can survive the dilution that inevitably tends to occur during the multilateral negotiation process.

24. Additional examples of a broad consensus leading to multilateral conventions with extradition provisions similar to those in the 1988 Convention are the Convention for the Suppression of Unlawful Seizure of Aircraft;[6] the Convention for the Suppression of Unlawful Acts against the Safety of the Civil Aviation;[7] the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (General Assembly resolution 3166 (XXVIII, annex)); the International Convention against the Taking of Hostages (General Assembly resolution 34/146, annex), the International Maritime Organization (IMO) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[8] and the Single Convention on Narcotic Drugs, 1961[9] as amended by the 1972 Protocol.[10] Experience in the negotiation of these conventions would seem to suggest that the consensus necessary for their adoption includes agreement both on defining the contours or definition of the specific threat or problem to be confronted and the remedies that need to be adopted to prevent or counteract the menace.

2. Regional extradition schemes

25. Less ambitious and, at least theoretically, easier to negotiate are regional agreements, such as the European Convention on Extradition[11] and its additional protocols,[12] and the European Convention on the Suppression of Terrorism.[13] Such regional pacts* (broadly understood to include groupings based on a political as well as a geographical commonality), may enjoy the tremendous advantages of an institutional structure, of compatible legal and political cultures and reciprocal knowledge of and confidence in the other parties' legal systems, which can greatly simplify negotiation of the underlying instrument and the resulting extradition practice. The workshop may be a forum for exchanging the experiences with such regional agreements.

26. The International Association of Penal Law recently held its XVth International Congress at Rio de Janeiro from 4 to 10 September 1994, on the regionalization of international criminal law and the protection of human rights in international cooperation in criminal proceedings, at which a number of recommendations were made. In its report to the preparatory colloquium for that Congress, held at Helsinki from 2 to 6 September 1992, the Association summarized national reports from 21 countries, replies to a questionnaire circulated by the Association, as well as describing recent developments in these areas. Its general report[14] included a survey of the major multilateral extradition arrangements. The material that follows is based on that report.

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*Other regional conventions on extradition include: the Convention concerning Extradition and Mutual Assistance in Criminal Matters (United Nations, *Treaty Series*, vol. 616, No. 8893, p. 80); the Extradition Agreement adopted by the Council of the League of Arab States on 14 September 1952 (League of Arab States, *Collection of Treaties and Agreements*, No. 95 (1978); the General Convention on the Cooperation in Judicial Matters of the Organisation Commune Africaine et Malgache (OCAM) (text in L. B. Sohn, ed., *Basic Documents of African Regional Organizations*, vol. 2 (1972), p. 616); the Treaty for the Extradition of Criminals and for Protection against Anarchism, adopted by certain American States on 28 January 1902 (*Consolidated Treaty Series*, vol. 190, p. 411); the Agreement on Extradition, adopted by certain American States anad signed at Caracas on 19 July 1911 (*Consolidated Treaty Series*, vol. 214, p. 129); the Convention on Extradition, signed by five republics of Central America and adopted on 7 February 1923 (M. O. Huston, *International Legislation*, vol. 2, *1922-1924* (1931), p. 954), with its follow-up Convention of 12 April 1934; the Convention on Private International Law of 20 February 1928, ratified by 15 Latin American States on 20 February 1928 (Bustamante Code), articles 344-381 (League of Nations, *Treaty Series*, vol. LXXXVI, No. 1950, p. 246); the Convention on Extradition of 26 December 1933, ratified by 12 American States (League of Nations, *Treaty Series*, vol. 162, p. 45), with further revisions added in 1940 and 1957 (Organization of American States, *Treaty Series* No. 36); and the Inter-American Convention on Extradition, signed by 12 Latin American States at Caracas, on 25 February 1981 (Organization of American States, *Treaty Series* No. 60).

27. One of the organizations that has been most active in developing European cooperation in criminal matters is the Council of Europe. This institution has enacted some 20 multilateral conventions on criminal law issues, including the European Convention on Extradition,[11] the Convention on Mutual Assistance in Criminal Matters,[15] and the Convention on the Transfer of Sentenced Persons (1983),[16] as well as the Convention on the Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime.[17]

28. The League of Arab States is an international intergovernmental organization that promotes cooperation, in various matters, including criminal law. The member States of the League have a Convention on Extradition (1953), and a general Convention on Judicial Assistance (1985), which covers matters such as legal assistance, including letters rogatory, the exchange of excerpts from criminal records, extradition, the recognition of foreign criminal judgements and the transfer of sentenced persons. Some members have indicated a preference for concluding treaties among a more limited number of Parties, either bilaterally or in the framework of the Arab Cooperation Council.

29. The Organization of African Unity (OAU) held a Pan-African Conference of Ministers of Justice in 1989 at Abuja, Nigeria. The plan of action adopted there called for a council of ministers of justice to be established as part of the OAU organization, which would be responsible for the development of African regional instruments for cooperation in legal matters, including extradition, and against the illicit traffic in narcotic drugs and psychotropic substances. ECOWAS has also concluded conventions on extradition and mutual assistance in criminal matters.

30. The Organization of American States (OAS) has taken steps to enact regional conventions on such matters as extradition and mutual legal assistance. Other organizations that may hold possibilities for promoting regional cooperation in criminal matters include the Mercado Común del Sur ("Mercosur") comprising Argentina, Brazil, Paraguay and Uruguay, which is to become operative by 1995.

31. The law ministers of Commonwealth countries have worked together over the years to devise schemes of cooperation which rely on the enactment of enabling legislation rather than on the conclusion of bilateral or multilateral treaties. The content of the national laws is largely determined by the content of the schemes approved and amended, as necessary, by ministers at regular meetings. The London Scheme Relating to the Rendition of Fugitive Offenders, 1966, was the first of the cooperative schemes and forms the basis of much of the extradition legislation in Commonwealth countries. In recent years, however, the law ministers have amended the Scheme to remove the traditional list of extraditable offences, to update provisions dealing with political offences and to permit a modification of the evidentiary requirements for extradition requests. Member countries of the Commonwealth are gradually amending their extradition laws to reflect these modernizing provisions and, in many cases to consolidate their laws relating to extradition to Commonwealth and non-commonwealth countries. As they do so, an increasing number of Commonwealth countries are in a position to use the Model Treaty on Extradition as a basis for the conclusion of bilateral extradition arrangements.

32. In the South-East Asian and South Pacific regions, in both the South Pacific Forum and the Pacific Islands Law Officers Meeting (PILOM), discussions take place on various forms of cooperation in criminal matters, including the drafting of legislation.

33. The Convention of Berlin of 19 May 1978 on the Transfer of Persons Who Have Been Sentenced to Loss of Freedom to the State of Which They Are Citizens is the only convention on criminal law matters that has been produced among the Central and Eastern European States. Through their accession to the Council of Europe, however, Central European States like Bulgaria, the Czech Republic, Hungary, Poland and Slovakia are now in a position to become parties to the relevant conventions of the Council of Europe.

34. Some countries become parties to multilateral conventions on criminal law matters elaborated in other regions. For example, Israel is a party to the European Convention on Extradition[11] and the European Convention on Mutual Assistance in Criminal Matters.[15]

35. The European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters have been ratified by many States but have been subject to quite a large number of reservations and declarations. This could be explained by the fact that, while the Conventions create binding obligations under international law, they are at the same time couched in relatively general terms and were among the earlier products of modern thinking in the area, and therefore there were few precedents as to interpretation. Member States may therefore have considered it prudent to make their position quite clear in respect of certain aspects of the Conventions. Some such reservations provided the basis of later protocols. Others preserve some subregional cooperation (the Nordic and Benelux schemes). Others have been withdrawn following amendments to domestic legislation or policies.

36. In order to avoid large numbers of reservations, which are considered by some to detract from the effectiveness of a treaty, two techniques were suggested. Firstly, the elaboration of more detailed conventions, taking into account the variety of legal systems and building into the instruments matters that would otherwise be expressed as reservations. Alternatively, conventions may be drafted with less binding obligations, providing mainly an instrument of voluntary cooperation. While more countries may join the treaty, however, it may not be effective in practice. The likelihood is that, the larger the scheme, the more reservations to it there will be. The suggestion has been made that reservations could be made for a fixed period, and would then lapse automatically.[18]

3. Bilateral Negotiations

37. Bilateral treaties will be the most prevalent form of international cooperation for the foreseeable future, permitting a basic level of cooperation in criminal matters despite dissimilar approaches to national crime control legislation. To assist in those tasks, a manual on the Model Treaty on Extradition, entitled *A Guide for Implementation*, has been prepared by the Crime Prevention and Criminal Justice Branch of the United Nations Secretariat with the assistance of the Government of Australia and a number of other national experts, for distribution at the workshop. The manual's explanation of the Model Treaty provisions can be of assistance to countries planning to enter into extradition negotiations, permitting the adaptation of the Model Treaty provisions to the needs of individual countries and offering useful information on what type of domestic legislation will be required to implement the various provisions.

38. Once negotiations on either a bilateral or multilateral basis have been concluded by the executive authorities of a State, the instrument must be brought into effect, a process often requiring domestic approval by the legislative branch of government and enactment of domestic implementing legislation. Depending upon a country's constitutional and parliamentary systems, this procedure may be a simple process or a risky endeavour, which may be delayed for years. For example, the refusal of the United States Congress to approve the Covenant of the League of Nations after the First World War, despite the efforts of President Wilson, illustrates the principle that an international instrument must always conform to domestic political realities.[19] Since such political realities change, and often are frequently difficult to calculate with precision during the process of negotiating the treaty, there can often be no assurance that the desired instrument or the necessary implementing legislation will be approved.

39. The degree of uncertainty will usually be proportional to political sensitivities concerning the other parties to the instrument or to its potentially controversial provisions. This may dictate prompt action when the political constellations are in the right configuration. A practical consequence of these political realities is that lengthy preliminary negotiations to prepare a mutually agreeable treaty may be worthwhile even when

immediate domestic acceptance is not politically feasible, so that the instrument will be ready and waiting for legislative consideration when a window of opportunity presents itself.

C. Succession to existing instruments*

40. The third issue to be examined under the topic of the existence of formal extradition mechanisms concerns the applicability of treaties or conventions to successor States having varying degrees of identity and continuity with the States which originally entered into those international relationships. This is a problem of great current concern and legal complexity and will be discussed at the workshop; reference will be made to the United Nations Convention on Succession of States in Respect of Treaties[20] and the Vienna Convention on the Law of Treaties (A/CONF.39/27 and Corr.1).

II. PROBLEMS IN THE PREPARATION OF EXTRADITION REQUESTS

A. Dual criminality and the "list" approach

41. The existence of legislation authorizing extradition and even an international instrument (treaty or convention) are only threshold steps towards the establishment of successful extradition practice. Many existing treaties contain provisions that can create difficulties in application, such as the so-called "list" of extraditable offences.

42. The requirement for criminality of the offence for which extradition is to be granted under the laws of both the requesting and requested sovereigns, that is, dual criminality, is a deeply ingrained principle of extradition law. It has been traditionally applied by listing named offences in the instrument, for example, murder and theft. The approach has certain deficiencies, which include a rigidity that excludes from coverage even offences that may subsequently have been penalized in both contracting States. That rigidity of structure also encourages a similar rigidity in juridical analysis, emphasizing the terminology or the label given to an offence, which obviously will differ depending on the legal systems and languages concerned, rather than on the underlying factual conduct.

43. The list concept is now generally considered to be obsolete and more modern treaties tend to use a so-called "general clause", with language similar to that used in the Model Treaty on Extradition: "For the purposes of the present Treaty, extraditable offences are offences that are punishable under the laws of both Parties by imprisonment ... for a maximum period of at least [one/two] year(s), or by a more severe penalty ...". (General Assembly resolution 45/116, annex, article 2, para. 1.)

44. To militate against the possibility of excessively formalistic application of the treaty based upon the semantic description of an offence rather than its practical nature, the Model Treaty also provides that:

> "In determining whether an offence is an offence punishable under the laws of both Parties, it shall not matter whether:
>
> "(a) The laws of the Parties place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

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*See paragraph 18 above.

"(b) Under the laws of the Parties the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting State shall be taken into account." (General Assembly resolution 45/116, annex, article 2, para. 2.)

45. The introduction of such explanatory clauses to reinforce a generic dual criminality standard explicitly minimizes the significance of the particular legislative language used to penalize certain conduct and encourages a less pedantic, more pragmatic focus on whether the underlying factual conduct is punishable by both contracting States, even if under differently named statutory categories. Many difficulties arise because of the need to make highly technical distinctions between different crimes, for example theft, fraud, embezzlement: malversation and breach of trust; degrees of homicide; financial misconduct by public officials; or various forms of participation in organized crime types of activities are thereby avoided.*

46. In order for the requested State to verify that the acts referred to in the extradition request are punishable under its own legislation, most treaties require that the text of the laws describing the essential elements of the offence be furnished. Thus, the Model Treaty on Extradition provides that:

"2. A request for extradition shall be accompanied by the following:

"(a) In all cases,

"...

"(ii) The text of the relevant provision of the law creating the offence or, where necessary, a statement of the law relevant to the offence and a statement of the penalty that can be imposed for the offense". (See General Assembly resolution 45/116, annex, article 5.)

47. A standard treaty clause also requires a statement of the facts constituting the offence, for example in the Model Treaty, for a person accused of an offence, "a description of the acts or omissions constituting the alleged offence" (see article 5, subpara. 2 (b)) or, for a person convicted of an offence, "a description of the acts or omissions constituting the offence" (see article 5, subpara. 2 (c)). While provision of the text of the relevant law is a straightforward requirement, which is readily understood and usually complied with in extradition requests, the required factual description is often reduced to a brief reference in conclusory terms, for example that the accused, acting in concert with named persons, at a certain time and place, distributed drugs, or fraudulently secured the property of named victims.

48. Such minimalist descriptions can create difficulties in deciding whether the crime for which a person has been charged corresponds to a criminal offence in the requested State. To reach that decision, the requested country's authorities may wish to know not simply whether the abstract legal elements of the offence correspond to an offence under domestic law, but whether the particular factual conduct that the person is alleged to have committed personally, the knowledge or intent alleged, and the acts of others for which the person to be extradited is claimed to be criminally responsible, would in their totality constitute a domestic offence. This problem is most evident in countries with a common-law tradition, which review the sufficiency of the evidence in support of a charge against an accused but unconvicted person. It can, however, arise whenever the applicability of a criminal law provision is not immediately apparent and the interpreting court or extradition authority wishes to resort to the factual allegations of the charging document

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*Further shortcomings and advantages of the "list approach" (also called the "enumeration method") and of the "general clause approach" (also called the "elimination method") are analysed in *Extradition for Drug-Related Offences, a Study of Existing Extradition Practices and Suggested Guidelines for Use in concluding Extradition Treaties* (United Nations publication, Sales No. E.85.XI.6), paras. 47-54.

or sentence of conviction to ascertain whether that conduct would be punishable under domestic law. This essential verification of double incrimination sometimes makes it necessary for the requested State to seek further information and clarification from the requesting State, which delays processing of the extradition request, particularly if the response requires additional translation of lengthy documents. Since many extradition treaties and domestic laws impose time limits for the period of detention allowed in connection with arrests for the purpose of extradition, such delays can potentially facilitate the escape of a fugitive.

49. A more ample and precise narrative description of the overall criminal conduct may thus be needed to permit the authorities of the requested State to determine whether dual criminality applies, particularly in requests for extradition of accused persons who have not yet been convicted, as to whom there will be no copy of the judgement or sentence usually required to be attached when a convicted fugitive is sought for service of a sentence.

50. Difficulties involving dual criminality can also be minimized by farsighted drafting of the treaty instrument. For example, the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Italy, executed at Rome on 13 October 1983, contains a clause providing a limited exception to the requirement for dual criminality, which might be useful for other States with federal structures and limited penal competence of the central Government. Article II, paragraph 4 of the Treaty, provides that:

> "The provisions of this Article apply whether or not the offense is one for which United States federal law requires proof of an element, such as interstate transportation, the use of the facilities of interstate commerce, or the effects upon such commerce, since such an element is required for the sole purpose of establishing the jurisdiction of United States federal courts."

51. Another clause in the same Treaty preempts what could otherwise be very difficult problems regarding technical common-law offences such as attempt and conspiracy and their relationship to the Italian civil law concepts of *associazione per delinquere* or *concorso in reato*. Article II, paragraph 2, concisely provides that:

> "An offense shall also be an extraditable offense if it consists of an attempt to commit, or participation in the commission of, an offense described in paragraph 1 of this article. Any type of association to commit offenses described in paragraph 1 of this article, as provided by the laws of Italy, and conspiracy to commit an offense described in paragraph 1 of this Article, as provided by the laws of the United States, shall also be extraditable offenses."

B. Political, tax and fiscal offences

52. In order to achieve as analytical a discussion of the exception of political, tax and fiscal offences as possible, it has to be borne in mind that problems relating to other grounds for refusal of extradition will be discussed in section III below, including the topic dealing with refusals based on improperly motivated requests.[21] Given the existence of this safeguard against abuse, the political offence objection can be viewed more narrowly and perhaps more successfully. It must also be admitted that political offences could have been discussed under the topic dealing with problems in the execution of requests, where the examination of improperly motivated requests logically belongs. The treatment of political offences was intentionally placed here, however, to emphasize that, if problems in connection with political offences are properly foreseen and provided for by international instruments, then their treatment becomes simply a matter of furnishing the necessary information in a treaty request to demonstrate that the extraditable offence was a common crime rather than a political offence.

53. Extradition for a nonviolent, purely "political" offence, such as prohibited criminal slander of the head of State by a political opponent or banned political activity, might embroil the requested State in the domestic

politics of the State requesting extradition, where today's dissidents may be tomorrow's governing class. Values of political tolerance and free speech may make a Government reluctant to grant extradition for such offences. The community of nations generally accepts without undue complaint or friction refusals to extradite based on the nature of non-violent offences as purely military or purely political, implemented either by treaty clauses or domestic legislation.

54. The same degree of international acceptance cannot be found with respect to refusals to extradite based upon the political offence exception when the conduct in question is violence committed for asserted political goals, and which therefore contains all of the elements of common crimes such as bombing and murder. The history of the political offence exception is an interesting study in the progression of civilized efforts to accommodate legitimate political change, while increasingly denying sanctuary to perpetrators of violence.

55. Past efforts to fix the limits of a political offence exception have never been fully satisfactory. Such efforts have experimented with criteria like the identity of the victim, for example granting the exception for crimes of violence directed at combatants as opposed to non-combatants in revolutionary conflicts or, conversely, denying the exception for assassination of heads of State and their families; with tests of whether the alleged criminal acts were proportional to the asserted political goal, or, phrased differently under the so-called predominance test, whether the political motive and effect were predominant or whether the criminal effect on by-passers and innocent persons, for example from the placement of a bomb, overwhelmed any alleged political purpose. Finally, the common-law incidence test established certain factual criteria to exclude violence not committed during and incident to an actual popular uprising against the Government of the territory where the crime was committed, and then applied a balancing test like the proportionality and predominance criteria.

56. These tests and the degree of tolerance towards violence that they reflect were in part historical reactions to anti-democratic, authoritarian regimes, in which armed resistance was considered perhaps the only means of securing a change of government. With the increasing global trend towards the democratic succession of Governments by electoral means, international law and civilized public opinion are becoming progressively more intolerant of political violence. Accordingly, treaty provisions to an increasing extent exclude bombings, assassinations and other forms of violence from the benefit of the exception, in recognition of the fact that justifications that may once have excused political violence no longer exist between treaty partners with democratic societies in which political change can be achieved by peaceful means.

57. The historic exclusion of tax and fiscal offences from the coverage of some extradition treaties may reflect the fact that such offences are an expression of the sovereignty of the State which imposes fiscal obligations on its citizens, and were therefore seen in the same light as political offences and subjected to the same limitations. Just as terrorist violence has led to a more restrictive definition of what constitutes a political offence, however, so have the phenomenon of money laundering and the infiltration of criminal proceeds into national economies led to a trend in modern treaties to treat fiscal offences in a similar manner to crimes under ordinary law.

58. It is also pertinent to consider whether the scope of continued generic exclusion of fiscal offences is now consistent with the penalization of drug-related money laundering under the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.*[5] The worldwide recognition of the need to remove the economic incentives for crime and safe havens for criminal proceeds, and the 40 recommendations made by the Financial Action Task Force on Money Laundering,[22] established by the Organization for Economic Cooperation and Development, which represent a major effort to protect legitimate

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*In article 3, paragraph 10, of the Convention, it is stated that drug-related offences and drug-related money laundering offences "shall not be considered fiscal offences" for the purpose of cooperation among the Parties to the Convention.

economies and financial systems against the investment and corrupting influence of criminal capital, would suggest a recognition that fiscal offenders no longer enjoy immunity from extradition.

59. The results of The World Ministerial Conference on Organized Transnational Crime, held at Naples from 21 to 23 November 1994, are worth mentioning here. The Conference recommended for adoption by the General Assembly the Naples Political Declaration and Global Action Plan against Organized Transnational Crime (A/49/748, annex, sect. I, subsect. A), in which the importance of preventing and controlling money laundering and the proceeds of crime was stressed. The Declaration and Global Action Plan were subsequently approved by the General Assembly in its resolution 49/159.

60. Similarly, the greater harmonization of laws penalizing "business" offences, such as monopolies, securities manipulations and banking abuses,* would not only protect the citizens of the countries enacting such laws but would facilitate the extradition of international fugitives sought for such crimes and would abolish the sanctuaries where they now can hide from justice.

61. It is hoped that, during the discussion of this subtopic, the experience and policies of countries that maintain clauses excluding tax and fiscal offences from the coverage of their extradition treaties can be compared with those of countries that have no such clauses. Issues relating to the proper definition of tax and fiscal offences, which may actually result in a rather restricted application of this exception, may also be discussed.

III. PROBLEMS IN THE EXECUTION OF REQUESTS

A. Refusals based on nationality and alternatives

62. Persuasive appeals based on different concepts of sovereignty can be made in favour of and against refusals to extradite, based upon the fact that the person whose requested surrender is a national of the requested State.** Exchanges of such views during this workshop might generate great heat but little light on the issue. It is therefore intended to encourage a more factually oriented discussion that will attempt to analyse the effectiveness of mechanisms designed to smooth the frictions resulting from constitutional or legislative prohibitions against the extradition of a country's own nationals, such as:

(a) The principle of *aut dedere aut punire*;

(b) Transfer of proceedings and of sentenced persons and deferred and temporary surrender;

(c) Execution of foreign sentences and other means of reconciling sovereign interests, for example by making non-extradition of nationals an optional grounds for refusal under a treaty, when it is not constitutionally mandated.

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*Such as those committed by the Bank of Commerce and Credit International.

**The four traditional arguments for nonextradition of nationals are: first, the fugitive ought not to be withdrawn from his natural judges; secondly, the State owes to its subjects the protection of its laws; thirdly, it is impossible to have complete confidence in the justice meted out by a foreign State, especially with regard to a foreigner; and fourthly, it is disadvantageous to be tried in a foreign language, separated from friends, resources and character witnesses (Royal Commission on Extradition, *Report of the Commissioners, 1878* (C.2039), p. 908. The non-extradition of nationals has been criticized by a number of writers, for example Jean-Claude Lambois, *Droit pénal international* No. 458 (1971); and Hans Schultz, "The principles of the traditional law of extradition", in *Legal Aspects of Extradition among European States*, No. 9, pp. 19-20 (Council of Europe, 1970).

63. The focus of this subtopic will be to elicit the experience of those with practical experience in this area, both within the refusing country and in the country seeking extradition and prosecution of the fugitive. Anticipated areas of discussion would include problems of conflicts of substantive and procedural law, representation of the interests of the requesting State, practical problems of submission of evidence, allocation of expenses, and the historical record of the effectiveness of such proceedings.

B. Refusals based on the principle of *ne bis in idem*

64. While the principle of *ne bis in idem* is generally recognized in the domestic law of most countries, its international application is much more a matter of negotiated agreements.* Accordingly, while two countries may agree not to extradite between themselves when there has been a final determination of guilt or innocence by either, they may yet extradite when the person sought has been convicted or absolved by a third State. One issue worthy of exploration is whether this principle for denial of extradition should be expanded from a final judgment to a decision either not to institute or to terminate proceedings, as is proposed as an optional grounds for refusal in article 4, subparagraph (b), of the Model Treaty on Extradition, and whether different considerations govern mandatory and discretionary prosecution systems in this regard. Another relates to what criteria and evidentiary information are appropriate and necessary to measure whether a second prosecution is for the same offence, particularly in complex and continuing group crimes. This second issue involves many of the same factual and procedural issues as arise in connection with establishing dual criminality.

C. *In absentia* convictions and other humanitarian concerns

65. Discussion will be directed first towards identifying the concepts recognized in various legal systems that permit trial in the physical absence of the accused, for example failure to appear after lawful notice, or voluntary departure after commencement of the proceedings waiving further presence, representation by legal counsel, and the significance of whether this is a privately selected and employed defence counsel or a court-appointed legal defender. Avenues for subsequent presentation of a defence or reconsideration of an *in absentia* conviction that may overcome objections to extradition will be examined.**

66. The Model Treaty establishes three conditions, all of which must be met to constitute mandatory grounds for refusal of extradition: an *in absentia* judgment, lack of opportunity to present or arrange for a defence, and absence of a procedure to have the case retried in the accused persons's presence. If the first condition is understood simply as the physical absence of the accused from the court proceeding, then it will only rarely be an issue of dispute, as when an accused person who is physically disruptive is detained in a separate room with an audio or audio-visual connection to the courtroom. The lack of opportunity to be present and defend can present much more complex issues, particularly when a legal system imposes a comprehensive residential registration system and imputes knowledge to a person from certain legally prescribed procedures for giving notice, and provides for appointed counsel to represent a non-appearing accused. The third condition, the opportunity for retrial, is an obvious means of overcoming any prior difficulties, and may be relatively simple and cost-effective in systems which permit the taking or testing of evidence at an appellate level or in a review procedure.

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*Nevertheless, as it prohibits the courts from trying a person twice for the same offence, the principle of double jeopardy is partially recognized as a general human right. In this regard see Protocol No. 7 (European Treaty Series No. 117) to the Convention for the Protection of Human Rights and Fundamental Freedoms.

**The protection of human rights in international cooperation in criminal proceedings were discussed by the International Association of Penal Law at its XVth Congress, held at Rio de Janeiro from 4 to 10 September 1994. This topic was also considered at length at the Preparatory Colloquium Section IV, held at Helsinki from 2 to 6 September 1992, the proceedings of which were published in the *International Review of Penal Law*, vol. 65, Nos. 1 and 2, 1994.

67. Comments by the participants on other issues of humanitarian interest will be invited.* For example, a general "humanitarian concerns" clause, such as article 4, subparagraph (h), of the Model Treaty on Extradition, could create uncontrolled discretion and non-enforceability. Accordingly, in the light of the Model Treaty's goals, it may be appropriate to discuss whether article 4, subparagraph (h), of the Model Treaty, which permits a treaty partner to reject extradition for any reason that it considers incompatible with humanitarian considerations, in view of the "personal circumstances" of the person, may invite arbitrary refusals in its actual implementation so long as they are phrased only in terms of general humanitarian considerations. In a treaty that contains mandatory and optional grounds for refusal, covering political offences, improperly motivated requests, *ne bis in idem*, special tribunals, imposition of the death penalty, imposition of cruel or unusual punishment, *in absentia* convictions, the accused being a national of the requested State etc., most humanitarian considerations would seem to have been foreseen explicitly or implicitly. In order to preserve predictability and reciprocal trust in treaty relationships, it may be preferable to negotiate specific grounds for refusal, for example when the fugitive exceeds a certain age, rather than creating an arbitrary discretion in one treaty partner to refuse extradition whenever a sympathetic argument can be made based upon the personal circumstances of the fugitive.

68. Human rights questions can be particularly difficult in cases where the requested State has an obligation to provide international assistance, which would, in turn, jeopardize fundamental individual rights which that State is also obliged to respect under a binding international instrument on human rights.** The State would then have conflicting obligations under international law. Relevant examples include a question on how to combine the obligation to extradite a person pursuant to an extradition treaty with the obligation under article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 39/46, annex), which prohibits the expulsion, return or extradition of a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture, if the State requesting extradition is not a party to that Convention; or how to combine the obligation to extradite with obligations under the Protocol No. 6[23] to the European Convention on Human Rights and Fundamental Freedoms, providing for the abolition of capital punishment.

69. Such situations could be resolved by applying the rule that the most recent law takes precedence over the later law (*lex posterior derogat legi priori*), assuming that both treaties are of the same legal order, that the obligations relate to the same subject matter and that the parties are both bound by the same conflicting treaty obligations.[24] According to another argument, specific domestic law can result in human rights treaties having the same rank as constitutional law and therefore taking precedence, whereas other treaties have the rank of ordinary law in that country. According to a similar reasoning, article 103 of the Charter of the United Nations provides that, in the event of a conflict between the obligations of Member States under the Charter (with its human rights provisions), and their obligations under any other international agreement, their obligations under the Charter shall prevail.***

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*The International Law Association, at its 66th Conference, held at Buenos Aires from 14 to 20 August 1994, also also considered the question of extradition and human rights and made a number of recommendations.

**For a further discussion of issues surrounding human rights and extradition see Sharon A. Williams, "Human rights safeguards and international cooperation in extradition: striking the balance", *Criminal Law Forum*, vol. 3, No. 2, p. 191; and Donald K. Piragoff and Marcia V. J. Kran, "The impact of human rights principles on extradition from Canada and the United States: the role of national courts", ibid., p. 225.

***A different approach was followed in the Soering case by the European Court of Human Rights (*Decisions of the European Court of Human Rights*, Series A, vol. 161), where the Court ordered a State to comply with its obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Treaty Series No. 5) by refusing to extradite Soering to a country where he would be under the threat of capital punishment whilst being subjected to protracted legal proceedings in solitary confinement.

70. Another approach could be the application of the doctrine of *jus cogens* to norms such as the prohibition of torture, discrimination as to race, religion, nationality and political opinion, slavery and arbitrary executions.

71. In connection with claims that a request for extradition may result in prosecution or punishment for religious, racial or other improper motivations, the questions to be explored in this discussion will concern ways in which the issue may be dealt with procedurally by the person being extradited, the requested State and the requesting State. For example:

(a) How a person whose extradition is requested can secure consideration of such a claim, and what means of proof can be advanced to support the claim;

(b) How a requesting State can and should respond to such allegations;

(c) How the requested State or its judicial authorities can obtain information themselves, what evidence should be considered by the authority who will decide the issue, and whether responsibility for deciding the issue should reside with the Government or with the judiciary;

(d) Whether there should be a presumption of regularity in connection with any regularly presented request unless contested by the person to be extradited, and what criteria should be followed in determining when that presumption should be considered to have been overcome.

D. Representation of the requesting State

72. In situations requiring legal representation or appearance by the requesting Government before a court or other appropriate body of the requested State, the following questions arise:

(a) Does the requested State undertake to represent vigorously the interests of the requesting State?

(b) What alternatives are available when there is a conflict of views or interests between the two States?

(c) If private counsel are employed, how can the requesting State most effectively monitor and control the positions and arguments advanced on its behalf that have potential policy implications beyond the single case?

73. The Model Treaty on Extradition does not touch on this issue, but many modern treaties do, providing that the ministry of justice or other authority of the requested State shall advise, assist and render all possible representation for the requesting State in extradition proceedings. This provision should always be written in terms that would recognize the fact that in some situations the interests of the requesting and requested States may differ, which may dictate the advisability of allowing the requesting State to appear as an interested party in the extradition proceedings, always in conformity with procedural rules of the requested State. This possibility of conflict, however, may well be a statistically improbable occurrence, which is better left to be worked out on an ad hoc basis, rather than trying to write an exception to a treaty provision providing a general duty to render all possible representation.

E. Provisional arrest and sufficiency of documentation

74. Unquestionably one of the most common public conceptions is that there is a procedure for an "international arrest warrant", usually associated in the popular imagination with the International Criminal Police Organization (ICPO/Interpol). The proper nature of the ICPO/Interpol notice system and other systems

for alerting police authorities to attempt to locate fugitives will be distinguished from requests for provisional arrest.

75. The practical difference between a notice to locate a fugitive and the degree of documentation and evidence required for a request for provisional arrest or a formal extradition request becomes immediately clear in those countries, often with a common-law legal tradition, which require a judicial review of the underlying evidence of the offence in order to permit arrest or extradition. Verbal formulas expressing this concept are found in footnotes to article 3 and article 5, subparagraph 2 (b), of the Model Treaty on Extradition (General Assembly resolution 45/116, annex, footnotes 98 and 101).

76. The typical ICPO/Interpol diffusion notice simply does not contain that degree of evidentiary detail, and certainly cannot be expected to contain it in a form procedurally acceptable to every country to which such a notice may be distributed. Accordingly, in many situations an ICPO/Interpol notice can only serve to locate a fugitive, and a separate request for provisional arrest must follow in order to permit an arrest and to initiate the process towards extradition. As contemplated in article 9 of the Model Treaty, such a request can also be communicated through ICPO/Interpol channels. So it is necessary to realize that in addition to ICPO/Interpol diffusion notices, other, more formal, communications, often using prosecutorial and diplomatic channels, may be necessary to achieve effective extradition practice. This will obviously require prompt communication procedures among the national authorities involved in progress.

77. It may, however, be a wise bureaucratic precaution for the requested State to require that a provisional request for arrest reflect or be accompanied by an assurance from the governmental entity with authority formally to request extradition that it concurs in the provisional arrest request and will provide the formal extradition documents within the time permitted. Such a request is useful to ensure that communication has taken place between the entity charged with fugitive apprehension, that is the country's national central bureau of ICPO/Interpol, representing its police authority, and the entity charged with requesting extradition, often a justice or foreign ministry, and that they are in agreement, as the desire to extradite may change during the months or years while a fugitive is being sought and ICPO/Interpol is not always notified of changed circumstances.

78. With further regard to countries that require an evidentiary demonstration, the ICPO/Interpol channel of communication may by itself be inadequate. The police authorities who make up ICPO/Interpol cannot be expected to have the legal expertise to be able in every case to identify, analyse and present the proof necessary to satisfy the evidentiary standards of another State in a form acceptable to that State, as some States accept statements only from witnesses with personal knowledge, some do not accept the results of a police interrogation of the subject of an investigation except when given in the presence of a judicial officer etc.

79. Indeed, an ICPO/Interpol national central bureau has many difficulties in obtaining ready access to such evidence, and may have to contact a local police agency to contact the prosecutor or judge, who must supply the evidentiary information. Judicial or prosecutorial participation is also often necessary to identify the proof that is needed to satisfy the standards of the requested State, particularly with regard to States of the common-law legal tradition, which require sufficient proof to demonstrate probable cause that the accused committed the offence.

80. In such cases, the usually short period of custody imposed pursuant to a request for provisional arrest (40 days, as proposed in article 9, paragraph 4, of the Model Treaty on Extradition) may dictate the need for direct contacts at least between the ministries of justice or even between prosecutorial and judicial offices after initial contact has been made through the relevant ministries. Information or documents initially transmitted between the criminal justice authorities concerned can, if necessary, be followed by transmission of the formal copies through diplomatic or other channels, as the relaying of the information through foreign

ministries or even through ICPO/Interpol may simply be incompatible with the realities of time limits established by law or judicial schedules.

81. Of course, any suggestion of direct contacts assumes the presence of the common language capability otherwise supplied by ICPO/Interpol. It is unrealistic on a global basis to expect individual prosecutorial or judicial offices to possess such a capability, but central authorities are increasingly becoming bilingual and multilingual, which will do much to permit the delay factors described below to be overcome.

IV. POLICY ISSUES CONCERNING IMPEDIMENTS TO EXTRADITION

A. Policy development and bridging the gaps between legal systems

82. On the merits of policy developments, a common issue requiring attention is the necessity to bridge the cultural gap between various legal systems, for example those with a common-law legal tradition contrasted with those tracing their origins to Roman law through the Napoleonic codes, and those of either of the previous origins contrasted with those based on Islamic law, or on customary law etc. Among the practical problems that often obstruct efforts to find solutions and to construct treaty provisions that will be mutually acceptable to two different legal cultures are the absence of common vocabularies and the existence of wholly different institutions, and even of unique functions.

83. Resolving these differences requires a profound familiarity with, and respect for, the foreign system concerned and careful consultation with practitioners within each system to know whether a proposed bridging mechanism or phrase will achieve the intended result. Treaty phrases that clearly express a domestic legal concept and have translated well into one set of foreign treaty negotiations may provoke misunderstanding and be wholly inapplicable in another.

84. The practical result of this is that even the most harmonious and productive set of treaty negotiations producing a mutually agreeable draft must await an extensive vetting by all concerned ministries and possible users of the treaties. This vetting should be designed to ensure that the agreed extradition language expresses precisely what was intended, and does so intelligibly, not only to treaty experts of foreign and justice ministries, but to the police and prison authorities who must execute the actual transfers of persons. Moreover, it may be advisable to seek the opinion of representatives of the judiciary and the prosecutors or government attorneys, and the defence attorneys, who will be contesting the treaty language in legal proceedings, in order to anticipate every construction, or misconstruction, that can be placed upon a word or phrase.

85. Several Member States have generously undertaken to prepare a supplemental paper on the theme of bridging the gap between civil and common law systems, which they will present at the workshop and which will be distributed with the present report.

B. Causes of delay and misunderstanding

86. Causes of delay and misunderstanding in implementing extradition relations and requests can be both structural and cultural. Contributions from participants in the workshop will be sought on solutions to the common problems of mechanical delay in the use of formal communication channels, in translation and in certification of documents. Reference will be made to the Model Treaty on Extradition, which in article 5, paragraph 1, provides a range of optional channels, which could be the diplomatic channel, between the ministries of justice, or through other authorities designated by the parties (such as police or judicial channels).

87. When developing policy to guide treaty negotiations and the resolution of problems in extradition practice, it is worth discussing the respective roles of foreign ministries in relation to the justice or interior ministries, including the factors that dictate whether justice and interior ministries need specialized international offices and representatives in order to protect their policy and operational interests in matters such as extradition and mutual assistance (evidence gathering). When such offices do exist, the question arises what factors should be considered in determining how to allocate tasks and responsibilities between the ministries concerned. Owing to their long history, extradition treaties as a rule rely much more heavily on the diplomatic channel than do mutual assistance treaties, which are a more recent development. This distinction may present a convenient example when examining the particular contributions to international cooperation that can best be made by the various ministries.

88. Since provisions concerning provisional arrest, such as those contained in article 9 of the Model Treaty, generally specified a fixed period of time in which delivery of the formal request for extradition must be effected, discussion will be encouraged on whether or not provisional arrests are frequently rejected or delayed because of expected difficulties in meeting the deadline for receipt of the formal documents. Explanations will be sought for why problems and delays in communication persist despite significant recent advances in document facsimile transmission technology. Factors leading to delay may include the need for several different authorities to participate in the process of providing documents (police or prosecution authority), authenticating them (judicial authority), and transmitting them (diplomatic authority). In this regard, it may be instructive to compare modern mutual legal assistance treaties, which often eliminate the requirement that documents be handled by diplomatic authorities as a means of expediting and enhancing cooperation.

89. An informal poll of participants may be used to introduce issues related to the adequacy and intelligibility of extradition documentation, to how often translated documents leave factual or procedural issues unclear, to how frequently elements that are lacking must be supplemented and how that can be accomplished given the time constraints of extradition proceedings. An inquiry will be made into how frequently extradition practitioners achieve expertise in the legal procedures and terminology of particular treaty partners and how that level of expertise can be improved.

90. The jargon and technical terminology of a legal culture is frequently almost unintelligible to the average citizen within that same society. Special efforts are therefore essential to render legal documents from one system understandable to the authorities of another system. Idiomatic expressions must be avoided because they may have no meaning when translated. Institutions and assumptions may need to be explained and terms defined. Suggestions for quality control mechanisms will also be solicited. For example, it would be well to investigate whether there is ever any follow-up by ministries to determine whether the translations being provided are sufficiently intelligible or whether any record is kept of requests for clarification.

91. Member States will be asked to share their experience with regard to the most cost-effective means of training extradition practitioners and improving extradition practice, for example by a combination of formalized training manuals and an instruction programme, by a period of apprenticeship, by visiting the counterpart State, by receiving visiting experts, or by frequent and in-depth treaty consultation at both the working and policy levels.

C. Technical cooperation activities and follow-up

92. To carry forward the momentum developed in the workshop towards improving extradition relations, participants will be asked to propose particular training needs and to describe the training methods and resources that are available. As a result of such statements, it is hoped that bilateral exchanges will be generated, and that a multilateral exchange will result within the context of a follow-up meeting on developing specific training programmes, for which the International Association on Penal Law has graciously

offered to consider acting as host. Other specific proposals and contributions at the conclusion of the workshop concerning training would, of course, be most welcome.

Notes

[1]See Torsten Stein, "Extradition", in R. Bernhardt, ed., *Encyclopaedia of Public International Law*, part 8, *Human Rights and the Individual in International Law - International Economic Relations*, published under the auspices of the Max Planck Institute for Comparative Public Law and International Law (Amsterdam, Elsevier Science Publishers B.V., 1985), p. 222.

[2]Stein, loc. cit., p. 223.

[3]M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 2nd ed. (1987), p. 325; M. Cherif Bassiouni, *International Extradition and World Public Order* (1974), p. 314.

[4]*Official Records of the Economic and Social Council, 1994, Supplement No. 11* (E/1994/31), chap. I, sect. C.

[5]*United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November-20 December 1988*, vol. I (United Nations publication, Sales No. E.94.XI.5), document E/CONF.82/15.

[6]United Nations, *Treaty Series*, vol. 859/60, No. 12325.

[7]United Nations, *Treaty Series*, vol. 974, No. 14118.

[8]International Maritime Organization publication, Sales No. 462 88.12.E.

[9]United Nations, *Treaty Series*, vol. 520, No. 7515.

[10]United Nations, *Treaty Series*, vol. 976, No. 4512.

[11]European Treaty Series No. 24.

[12]European Treaty Series Nos. 86 and 98 respectively.

[13]European Treaty Series No. 90.

[14]Julian J. E. Schutte, "The regionalization of international criminal law and the protection of human rights in international cooperation in criminal proceedings: general report [to the preparatory colloquium, section IV, Helsinki (Finland), 2-6 September 1992]" in *International Review of Penal Law*, vol. 65 (1994), 1st and 2nd quarters, chap. II.

[15]European Treaty Series No. 30.

[16]European Treaty Series No. 112.

[17]European Treaty Series No. 141.

[18]M. Bonn, R.C.P. Hoontjens,A.M.M. Orie and A.M.G. Smit, "The regionalization of international criminal law: Netherlands national report" in *International Review of Penal Law*, vol. 65 (1994), 1st and 2nd quarters, chap. III, p. 367.

[19]*The New Encyclopaedia Britannica*, vol. 29, Macropædia (Chicago, Encyclopaedia Britannica Inc.), p. 253.

[20]United Nations publication, Sales No. F. 79.V.10.

[21]Article 3, paragraph 2, of the European Convention on Extradition of 1957 and its additional protocols (European Treaty Series No. 24).

[22]Report of the Financial Action Task Force on Money Laundering, dated 7 February 1990.

[23]European Treaty Series No. 114.

[24]Julian J. E. Schutte, *loc. cit.*, p. 108.